REFUGEE LAW AND COMPARATIVE ASPECTS OF SOCIAL JUSTICE
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EXCERPTS FROM UNHCR HANDBOOK

Procedures for the Determination of Refugee Status

A. GENERAL

190. It should be recalled that an applicant for refugee status is normally in a particularly vulnerable situation. He finds himself in an alien environment and may experience serious difficulties, technical and psychological, in submitting his case to the authorities of a foreign country, often in a language not his own. His application should therefore be examined within the framework of specially established procedures by qualified personnel having the necessary knowledge and experience, and an understanding of an applicant's particular difficulties and needs.

191. Due to the fact that the matter is not specifically regulated by the 1951 Convention, procedures adopted by States parties to the 1951 Convention and to the 1967 Protocol vary considerably. In a number of countries, refugee status is determined under formal procedures specifically established for this purpose. In other countries, the question of refugee status is considered within the framework of general procedures for the admission of aliens. In yet other countries, refugee status is determined under informal arrangements, or ad hoc for specific purposes, such as the issuance of travel documents.

192. In view of this situation and of the unlikelihood that all States bound by the 1951 Convention and the 1967 Protocol could establish identical procedures, the Executive Committee of the High Commissioner's Programme, at its twenty-eighth session in October 1977, recommended that procedures should satisfy certain basic requirements. These basic requirements, which reflect the special situation of the applicant for refugee status, to which reference has been made above, and which would ensure that the applicant is provided with certain essential guarantees, are the following:
(i) The competent official (e.g., immigration officer or border police officer) to whom the applicant addresses himself at the border or in the territory of a Contracting State should have clear instructions for dealing with cases which might come within the purview of the relevant international instruments. He should be required to act in accordance with the principle of nonrefoulement and to refer such cases to a higher authority.
(ii) The applicant should receive the necessary guidance as to the procedure to be followed.
(iii) There should be a clearly identified authority – wherever possible a single central authority – with responsibility for examining requests for refugee status and taking a decision in the first instance.
(iv) The applicant should be given the necessary facilities, including the services of a competent interpreter, for submitting his case to the authorities concerned. Applicants should also be given the opportunity, of which they should be duly informed, to contact a representative of UNHCR.
(v) If the applicant is recognized as a refugee, he should be informed accordingly and issued with documentation certifying his refugee status.
(vi) If the applicant is not recognized, he should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial, according to the prevailing system.

(vii) The applicant should be permitted to remain in the country pending a decision on his initial request by the competent authority referred to in paragraph (iii) above, unless it has been established by that authority that his request is clearly abusive. He should also be permitted to remain in the country while an appeal to a higher administrative authority or to the courts is pending.27

194. Determination of refugee status, which is closely related to questions of asylum and admission, is of concern to the High Commissioner in the exercise of his function to provide international protection for refugees. In a number of countries, the Office of the High Commissioner participates in various forms, in procedures for the determination of refugee status. Such participation is based on Article 35 of the 1951 Convention and the corresponding Article 11 of the 1967 Protocol, which provide for co-operation by the Contracting States with the High Commissioner's Office.

B. ESTABLISHING THE FACTS

(1) Principles and methods

195. The relevant facts of the individual case will have to be furnished in the first place by the applicant himself. It will then be up to the person charged with determining his status (the examiner) to assess the validity of any evidence and the credibility of the applicant's statements.

196. It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt.

197. The requirement of evidence should thus not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status 27 Official Records of the General Assembly, Thirty-second Session, Supplement No. 12 (A/32/12/Add.1), para. 53 (6) (e). finds himself. Allowance for such possible lack of evidence does not, however, mean that unsupported statements must necessarily be accepted as true if they are inconsistent with the general account put forward by the applicant.

198. A person who, because of his experiences, was in fear of the authorities in his own country may still feel apprehensive vis-à-vis any authority. He may therefore be afraid to

speak freely and give a full and accurate account of his case.
199. While an initial interview should normally suffice to bring an applicant's story to light, it may be necessary for the examiner to clarify any apparent inconsistencies and to resolve any contradictions in a further interview, and to find an explanation for any misrepresentation or concealment of material facts. Untrue statements by themselves are not a reason for refusal of refugee status and it is the examiner's responsibility to evaluate such statements in the light of all the circumstances of the case.

200. An examination in depth of the different methods of fact-finding is outside the scope of the present Handbook. It may be mentioned, however, that basic information is frequently given, in the first instance, by completing a standard questionnaire. Such basic information will normally not be sufficient to enable the examiner to reach a decision, and one or more personal interviews will be required. It will be necessary for the examiner to gain the confidence of the applicant in order to assist the latter in putting forward his case and in fully explaining his opinions and feelings. In creating such a climate of confidence it is, of course, of the utmost importance that the applicant's statements will be treated as confidential and that he be so informed.

201. Very frequently the fact-finding process will not be complete until a wide range of circumstances has been ascertained. Taking isolated incidents out of context may be misleading. The cumulative effect of the applicant's experience must be taken into account. Where no single incident stands out above the others, sometimes a small incident may be "the last straw"; and although no single incident may be sufficient, all the incidents related by the applicant taken together, could make his fear "well-founded" (see paragraph 53 above).

202. Since the examiner's conclusion on the facts of the case and his personal impression of the applicant will lead to a decision that affects human lives, he must apply the criteria in a spirit of justice and understanding and his judgement should not, of course, be influenced by the personal consideration that the applicant may be an "undeserving case".

(2) Benefit of the doubt

203. After the applicant has made a genuine effort to substantiate his story there may still be a lack of evidence for some of his statements. As explained above (paragraph 196), it is hardly possible for a refugee to "prove" every part of his case and, indeed, if this were a requirement the majority of refugees would not be recognized. It is therefore frequently necessary to give the applicant the benefit of the doubt.

204. The benefit of the doubt should, however, only be given when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility. The applicant's statements must be coherent and plausible, and must not run counter to generally known facts.

(3) Summary

205. The process of ascertaining and evaluating the facts can therefore be summarized as follows:

(a) The applicant should:
(i) Tell the truth and assist the examiner to the full in establishing the facts of his case.
(ii) Make an effort to support his statements by any available evidence and give a satisfactory explanation for any lack of evidence. If necessary he must make an effort to procure additional evidence.
(iii) Supply all pertinent information concerning himself and his past experience in as much detail as is necessary to enable the examiner to establish the relevant facts. He should be asked to give a coherent explanation of all the reasons invoked in support of his application for refugee status and he should answer any questions put to him.

(b) The examiner should:
(i) Ensure that the applicant presents his case as fully as possible and with all available evidence.
(ii) Assess the applicant's credibility and evaluate the evidence (if necessary giving the applicant the benefit of the doubt), in order to establish the objective and the subjective elements of the case.
(iii) Relate these elements to the relevant criteria of the 1951 Convention, in order to arrive at a correct conclusion as to the applicant's refugee status.

C. CASES GIVING RISE TO SPECIAL PROBLEMS IN ESTABLISHING THE FACTS

(1) Mentally disturbed persons

206. It has been seen that in determining refugee status the subjective element of fear and the objective element of its well-foundedness need to be established.

207. It frequently happens that an examiner is confronted with an applicant having mental or emotional disturbances that impede a normal examination of his case. A mentally disturbed person may, however, be a refugee, and while his claim cannot therefore be disregarded, it will call for different techniques of examination.

208. The examiner should, in such cases, whenever possible, obtain expert medical advice. The medical report should provide information on the nature and degree of mental illness and should assess the applicant's ability to fulfil the requirements normally expected of an applicant in presenting his case (see paragraph 205 (a) above). The conclusions of the medical report will determine the examiner's further approach.

209. This approach has to vary according to the degree of the applicant's affliction and no rigid rules can be laid down. The nature and degree of the applicant's "fear" must also be taken into consideration, since some degree of mental disturbance is frequently found in persons who have been exposed to severe persecution. Where there are indications that the fear expressed by the applicant may not be based on actual experience or may be an

exaggerated fear, it may be necessary, in arriving at a decision, to lay greater emphasis on the objective circumstances, rather than on the statements made by the applicant.

210. It will, in any event, be necessary to lighten the burden of proof normally incumbent upon the applicant, and information that cannot easily be obtained from the applicant may have to be sought elsewhere, e.g. from friends, relatives and other persons closely acquainted with the applicant, or from his guardian, if one has been appointed. It may also be necessary to draw certain conclusions from the surrounding circumstances. If, for instance, the applicant belongs to and is in the company of a group of refugees, there is a presumption that he shares their fate and qualifies in the same manner as they do.

211. In examining his application, therefore, it may not be possible to attach the same importance as is normally attached to the subjective element of "fear", which may be less reliable, and it may be necessary to place greater emphasis on the objective situation.
212. In view of the above considerations, investigation into the refugee status of a mentally disturbed person will, as a rule, have to be more searching than in a "normal" case and will call for a close examination of the applicant's past history and background, using whatever outside sources of information may be available.

(2) Unaccompanied minors

213. There is no special provision in the 1951 Convention regarding the refugee status of persons under age. The same definition of a refugee applies to all individuals, regardless of their age. When it is necessary to determine the refugee status of a minor, problems may arise due to the difficulty of applying the criteria of "well-founded fear" in his case. If a minor is accompanied by one (or both) of his parents, or another family member on whom he is dependent, who requests refugee status, the minor's own refugee status will be determined according to the principle of family unity (paragraphs 181 to 188 above).

214. The question of whether an unaccompanied minor may qualify for refugee status must be determined in the first instance according to the degree of his mental development and maturity. In the case of children, it will generally be necessary to enrol the services of experts conversant with child mentality. A child – and for that matter, an adolescent – not being legally independent should, if appropriate, have a guardian appointed whose task it would be to promote a decision that will be in the minor's best interests. In the absence of parents or of a legally appointed guardian, it is for the authorities to ensure that the interests of an applicant for refugee status who is a minor are fully safeguarded.

215. Where a minor is no longer a child but an adolescent, it will be easier to determine refugee status as in the case of an adult, although this again will depend upon the actual degree of the adolescent's maturity. It can be assumed that – in the absence of indications to the contrary – a person of 16 or over may be regarded as sufficiently mature to have a well-founded fear of persecution. Minors under 16 years of age may normally be assumed not to be sufficiently mature. They may have fear and a will of their own, but these may not have the same significance as in the case of an adult.

216. It should, however, be stressed that these are only general guidelines and that a minor's mental maturity must normally be determined in the light of his personal, family and cultural background.

217. Where the minor has not reached a sufficient degree of maturity to make it possible to establish well-founded fear in the same way as for an adult, it may be necessary to have greater regard to certain objective factors. Thus, if an unaccompanied minor finds himself in the company of a group of refugees, this may – depending on the circumstances – indicate that the minor is also a refugee.

218. The circumstances of the parents and other family members, including their situation in the minor's country of origin, will have to be taken into account. If there is reason to believe that the parents wish their child to be outside the country of origin on grounds of well-founded fear of persecution, the child himself may be presumed to have such fear.

219. If the will of the parents cannot be ascertained or if such will is in doubt or in conflict with the will of the child, then the examiner, in cooperation with the experts assisting him, will have to come to a decision as to the well-foundedness of the minor's fear on the basis of all the known circumstances, which may call for a liberal application of the benefit of the doubt.

TRACImmigration

New Data on Unaccompanied Children in Immigration Court

The recent surge of tens of thousands of unaccompanied children attempting to enter the country has touched off a heated debate. Some ask whether having Immigration Judges decide the fate of these children only postpones their inevitable deportation since it is alleged that few have any valid claim to remain in the United States. Others hotly dispute this contention.

TRAC Series on Juveniles and Families in Immigration Court

I: New Data on Unaccompanied Children

II: Representation for Unaccompanied Children

III: Representation for Women with Children

IV: Representation Makes 14-Fold Difference

V: Potential Impact of Targeted Raids

Tools: Juvenile Deportation Proceedings and Women With Children

This special report presents information derived from current and detailed case-by-case Immigration Court records tracing decisions on removal orders sought by the Department of Homeland Security (DHS) concerning unaccompanied children who have been apprehended by the agency. The data, current through June 30, 2014, was obtained by the Transactional Records Access Clearinghouse (TRAC) at Syracuse University from the Executive Office for Immigration Review (EOIR) under the Freedom of Information Act.

The data trace the status of over 100,000 such cases. The information includes every instance over the last decade flagged as a juvenile case currently recorded in EOIR files. In each of these cases, the Department of Homeland Security instituted the action requesting that the court issue an order to deport these children. Because the DHS has authority to screen and then immediately deport unaccompanied Mexican children without any formal hearing, only a small proportion of children from Mexico are referred to the Immigration Court by the DHS. For this reason unaccompanied children who are immediately deported by DHS are not part of the court data examined here. See About the Data for additional details.

Table 1. Juvenile Cases Filed in Immigration Courts

Fiscal Year	Total Filed	Currently Pending	Percent Pending
2005	8,900	74	0.8%
2006	7,906	92	1.2%
2007	7,049	117	1.7%
2008	6,249	209	3.3%
2009	5,726	437	7.6%
2010	7,162	1,036	14.5%
2011	6,425	1,462	22.8%
2012	11,411	4,771	41.8%
2013	21,351	14,812	69.4%
2014*	19,671	18,631	94.7%
2005-2014	101,850	41,641	40.9%

**through June 2014*

As shown in Table 1, cases filed in the courts in the last few years (since the increase began) make up about half of the total cases filed. As of end of June, court proceedings had been completed on 59 percent of all cases (60,209 matters out of the 101,850). Proceedings were ongoing for the remaining 41 percent.

Accompanying this special report is a new web-based tool which provides the public with detailed access to the data TRAC has compiled on these cases. Using this tool, you can drill in to pinpoint how many cases have

Table 2. Pending Workload in Immigration Courts*

Type	Number	Percent
Juvenile cases	41,641	11%
Other cases	333,862	89%
total	376,503	100%

*as of June 30, 2014

been filed for any particular nationality, state, immigration court, and hearing location, and also find the current status of these cases. For those cases in which the proceedings have concluded, the outcome is provided. Additional details on each case are also available in the data tool.

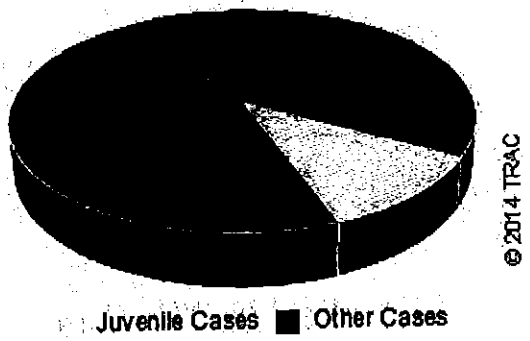

Figure 1. Pending Workload in Immigration Courts

While public attention has been focused on the plight of juveniles arriving at our borders and their growing numbers, unaccompanied children make up a small proportion of those impacted by the current administration's enforcement activities. Although the recorded number of new Immigration Court juvenile cases during the last three months (April - June 2014) has doubled over the previous six months of this fiscal year (October 2013 - March 2014), these cases still make up only 11 percent of the Immigration Court's backlog — a total of 41,641 pending juvenile cases out of the total backlog of 375,503 cases. See Table 2 and Figure 1.

How Often Does a Child Appear Unrepresented?

It is well established that the odds of prevailing in court are much better for an individual who has the assistance of a lawyer. Yet the government is under no obligation to provide legal counsel to the indigent — even if they are children — in Immigration Court proceedings. Meanwhile, the government itself is always represented by an attorney.

Few children appearing in Immigration Court have the financial resources to hire an attorney, even though in most of the matters it is reasonable to assume they do not comprehend the nature of the proceedings they face or the complex procedural and substantive challenges of the immigration law. (Of course, there is also a language barrier, since most unaccompanied minors do not speak English.) While many immigration lawyers and law clinics attempt to provide legal assistance on a pro bono basis, their numbers are insufficient to meet the need. One result of this is that children were not represented about half of the time (48%) they appeared in Immigration Court, although there is wide variation by state and hearing location. Less than a third (31%) have thus far been able to secure an attorney in currently pending cases. See Table 3.

Table 3. How Often Juveniles Appear With and Without Representation

Immigration Court Cases	No Attorney	With Attorney	Percent With Attorney
Total Closed	29,173	31,036	52%
Pending	28,578	13,063	31%
Total Cases Filed	57,751	44,099	43%

How Often Do Immigration Judges Conclude That Children Can Stay?

The data show that in a large number of cases, Immigration Judges decline to order these children's removal. Many are found to have legitimate legal grounds to remain in this country. The data also show that outcomes in these cases are all too often determined by whether an attorney was present to assist the child in presenting his or her case. For this reason, results are tabulated separately for children with and without representation. (For those cases in which Immigration Court proceedings have concluded, the child was represented in 31,036 cases, and appeared without an attorney in the remaining 29,173 of juvenile cases heard by an Immigration Judge.)

Here are the results in brief:

- ***Outcome if attorney present.*** In almost half (47%) of the cases in which the child was represented, the court allowed the child to remain in the United States. The child was ordered removed in slightly more than one in four (28%) of these cases. And in the remaining quarter (26%) the judge entered a "voluntary departure" (VD) order. (While with a VD order the child is required to leave the country, the child avoids many of the more severe legal consequences of a removal order.)
- ***Outcome if no attorney.*** Where the child appeared alone without representation, nine out of ten

children were ordered deported — 77 percent through the entry of a removal order, and 13 percent with a VD order. One in ten (10%) were allowed to remain in the country.

Table 4 provides year-by-year outcome data for these cases. This table is based on the fiscal year the DHS filed the case in the Immigration Courts, and not the year of the court's decision. This arrangement of data facilitates examining the outcomes for any particular cohort of children defined by when they were apprehended and placed in removal proceedings. Given the increasing numbers of unaccompanied children that are now arriving, it is reasonable to ask the question "Do these children appear to have any less legitimate claims to remain in the country than those who arrived earlier in the decade?"

Answers to this question must be tentative, given the large proportion of cases that remain to be decided for children who have arrived recently. However, outcomes thus far do not suggest that children who have arrived during the recent surge present less worthy cases. Examining cases filed during the last 21 months (FY 2013 through June 30, 2014) for which outcomes have been reached, a greater proportion of the children have been allowed to remain in this country, and a smaller percentage were ordered deported, relative to earlier cohorts of children. This was true both for those who were represented as well as those who were not. For example, for children who had the assistance of an attorney, less than one out of three were ordered deported, while two-thirds were allowed by the Immigration Judge to stay. This is a higher proportion of children allowed to remain in the U.S. than the roughly 50/50 split that was previously seen for the decade as a whole. Even without the assistance of an attorney, over a quarter of recently arrived children have been allowed by an Immigration Judge to remain, as compared with only 10 percent for the decade as a whole.

Table 4. Outcomes for Juvenile Cases in the Immigration Courts

Fiscal Year	No Attorney				With Attorney			
	Cases Decided	Removal Order	Voluntary Departure	Stay in U.S.	Cases Decided	Removal Order	Voluntary Departure	Stay in U.S.
2005	4,967	82%	10%	8%	3,859	38%	31%	31%
2006	3,792	82%	13%	6%	4,022	40%	32%	28%
2007	3,173	81%	14%	4%	3,759	41%	25%	34%
2008	2,719	83%	12%	5%	3,321	40%	22%	38%
2009	2,123	69%	24%	7%	3,166	23%	32%	45%
2010	2,558	70%	22%	8%	3,568	17%	29%	54%
2011	2,071	71%	19%	9%	2,892	18%	23%	59%
2012	3,238	79%	10%	10%	3,402	14%	20%	65%
2013	3,797	70%	4%	25%	2,742	9%	13%	78%
2014*	735	55%	3%	42%	305	12%	22%	66%
2005-2014	29,173	77%	13%	10%	31,036	28%	26%	47%

**through June 2014*

Reasons Children Are Allowed To Stay

The DHS initiates these court proceedings by seeking a removal order, and the Immigration Judge has to decide whether or not it is appropriate under the particular set of facts given the law that applies to the case. While an Immigration Judge may find that a specific type of relief provided by immigration statutes should be granted, the removal order also can be denied when DHS does not have valid grounds for removing the individual. In the case of unaccompanied juveniles, there are a range of statutory protections that may apply and that can result in the court denying the government's request. For example, asylum may apply to those fleeing persecution. Special Immigrant Juvenile Status (SIJS) can be granted to protect children who have been abused, abandoned or neglected. T-visas exist for those found to be victims of human trafficking, while U-visas can be granted for victims of certain crimes.

Most of the time, whether these special forms of relief are granted is determined by some other government agency and not directly by an Immigration Judge and thus would not be recorded as the basis for the court's decision. Only when the judge is the person that actually grants a specific form of relief does the court's database record the type of relief granted, such as asylum. One of the reasons that decisions in court cases frequently take time, apart from the court's own backlog of cases, is because court proceedings may be adjourned waiting for another government body to act on applications under these provisions.

When another agency has granted one of these forms of relief, the Immigration Judge typically will order the case "terminated," or close the case for "other" unspecified reasons, either through a decision or some form of administrative closure. As shown in Table 5, when the child has an attorney, "terminated" and "other" are the most common reasons recorded for closing a case and allowing the child to remain in the country. Relief personally ordered by the Immigration Judge occurs less frequently.

Table 5. Specific Outcomes for Juvenile Cases in the Immigration Courts

Case Outcome	Number		Percent	
	No Attorney	With Attorney	No Attorney	With Attorney
Removal Order	22,406	8,607	77%	28%
Voluntary Departure	3,759	7,970	13%	26%
Stay in U.S.				
Case Terminated	1,128	6,572	4%	21%
Relief Granted	168	2,710	1%	9%
Prosecutorial Discretion	315	1,775	1%	6%
Other Closure	1,397	3,402	5%	11%
Total Closed	29,173	31,036	100%	100%

DHS itself can recommend that a case be closed and the child be allowed to remain in the country through the exercise of its longstanding prosecutorial discretion (PD) authority. Since FY 2012, the court has included PD as a basis for the closure of a case. Since that time, PD has been the reason for 9 percent of juvenile closures. Examined another way, this amounts to 3 percent of all concluded juvenile cases filed during the last decade.

Look for Further Updates

TRAC plans to continue tracking Immigration Court proceedings on juvenile cases. We will regularly update this data series focusing on children, and will provide public access to the updated results via our web-based data access tool. This will allow the public to examine when court proceedings are concluded as well as the outcomes reached. TRAC will also continue to add information on new filings as soon as the court records on the filing are received. If you would like to receive automatic notification when we post new data, follow us on Twitter or sign up for our email alerts.

Report date: July 15, 2014

TRACImmigration

Representation for Unaccompanied Children in Immigration Court

Unaccompanied children[1] are represented by an attorney in only about one-third (32%) of 63,721 cases pending in Immigration Court as of October 31, 2014, according to the latest data. Some 43,030 juveniles have *not* as yet been able to hire an attorney to assist them or to find pro bono representation (see Figure 1). For the 21,588 children's cases filed and already decided since the surge of unaccompanied minors from Central America began three years ago, only 41 percent had representation.

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Tools: Juvenile Deportation Proceedings and Women With Children

Using a decade's worth of court records, a previous TRAC report found that whether or not an unaccompanied juvenile had an attorney was the single most important factor influencing the case's outcome. This report examines factors related to finding representation and presents new results — using data updated through October 2014 — on outcome depending upon whether the unaccompanied juvenile was represented.

As before, these results are based on case-by-case Immigration Court records obtained by the Transactional Records Access Clearinghouse (TRAC) at Syracuse University from the Executive Office for Immigration Review (EOIR) under the Freedom of Information Act.

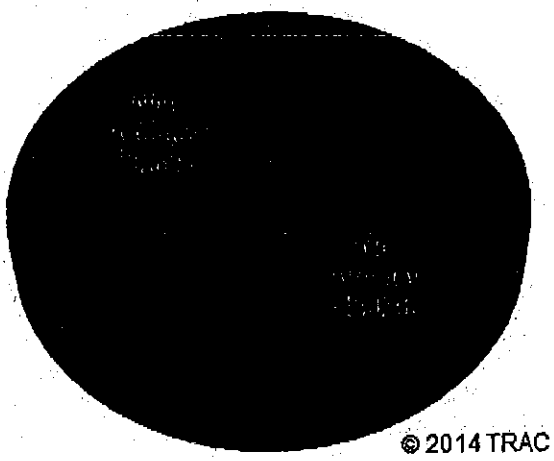

Figure 1. Pending Cases in Immigration Court Involving Unaccompanied Juveniles

The Impact of Representation on Outcome

Outcomes for unaccompanied children whose cases were filed and decided during the past three years were examined. The preiod from FY 2012 through FY 2014 was selected since it covers the recent surge in cases involving unaccompanied minors from Central America that began in FY 2012. With the updated data current through the end of October 2014, court records show that over twenty thousand of these cases have already been decided.

Here are the results for children arriving during this latest surge (see Figure 2):

- ***Outcome if attorney present.*** In almost three out of four (73%) of the cases in which the child was represented, the court allowed the

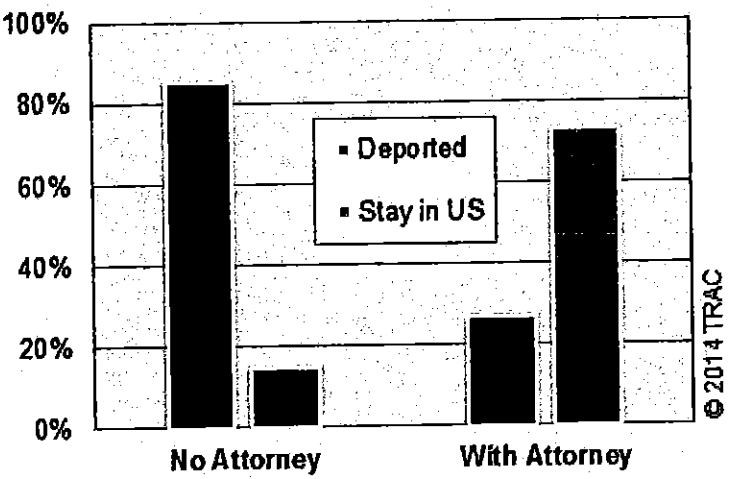

Figure 2. Decisions in Immigration Court Cases Involving Unaccompanied Juveniles

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child to remain in the United States. The child was ordered removed in slightly more than one in ten (12%) of these cases. And in the remaining 15 percent the judge entered a "voluntary departure" (VD) order. (While with a VD order the child is required to leave the country, the child avoids many of the more severe legal consequences of a removal order.)

- ***Outcome if no attorney.*** Where the child appeared alone without representation, only 15 percent were allowed to remain in the country. All the rest were ordered deported — 80 percent through the entry of a removal order, and 5 percent with a VD order.

Table 1 compares outcome for unaccompanied children whose cases were filed and decided during the past three years with all cases from the last ten years.

Table 1. Decisions in Immigration Court Cases Involving Unaccompanied Juveniles

Fiscal Year Case Filed	No Attorney				With Attorney			
	Cases Decided	Removal Order	Voluntary Departure	Stay in U.S.	Cases Decided	Removal Order	Voluntary Departure	Stay in U.S.
Ten Year Total*	34,263	79%	11%	10%	33,694	27%	24%	49%
Since Surge Began								
FY 2014	4,778	88%	2%	11%	1,208	16%	15%	69%
FY 2013	4,623	74%	4%	22%	3,710	9%	11%	80%
FY 2012	3,416	79%	10%	10%	3,843	14%	19%	67%
FY 2012 through FY 2014	12,817	80%	5%	15%	8,761	12%	15%	73%

** Covers FY 2005 - FY 2014 plus first month of FY 2015 (October 2014)*

Representation Rates and the Volume of Juvenile Cases

The surge in juvenile cases before the Immigration Courts is graphically displayed month-by-month in Figure 3 and its supporting detail table. The rise that began in FY 2012 was fairly gradual at first. In March 2012 the number of new juvenile cases filed each month passed 1,000. In March 2013 the number exceeded 2,000 for the first time, and 3,000 cases were filed in December 2013. Three months later in March 2014 the number of new juvenile cases filed surpassed 5,000, and by May filings had reached 8,000 cases. The peak was reached during June 2014 with 8,571 cases filed and then fell rapidly. By September 2014 the number had fallen below the 1,000 mark, declining to 886. (Because of delays in court recording, the numbers for the last few months may understate actual filings.)

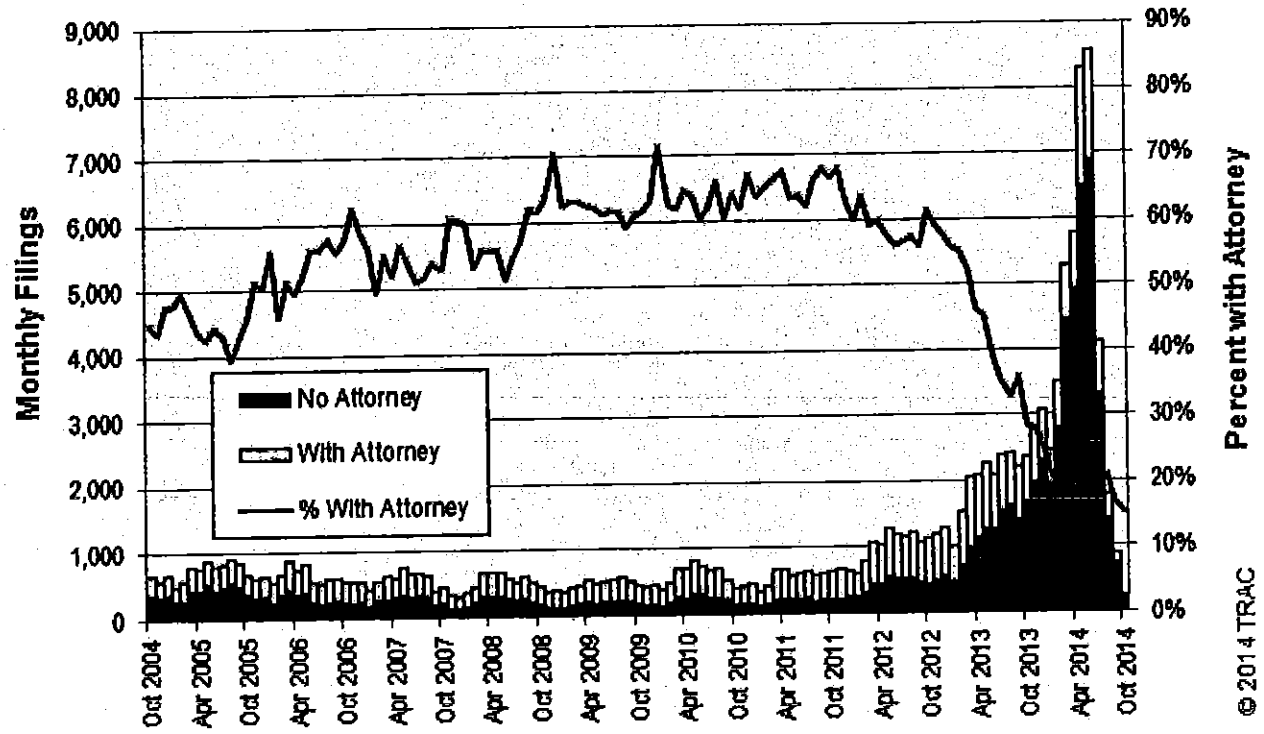

Figure 3. Immigration Court Cases Involving Unaccompanied Juveniles Filed by Month *(See data)*

Figure 3 also graphs how the proportion of unaccompanied children's cases with representation has been impacted by the surge. For several years starting about September 2008, representation rates had ranged generally between 60 and 70 percent. But as the volume of cases began to rise during FY 2012, representation rates immediately started falling. While the *number* of represented cases rose, they did not keep up with the rising tide of cases, so that the *proportion* of represented children fell. Because these children are not entitled to a court-appointed attorney, and many unaccompanied children are without resources to hire one, the supply of attorneys with the necessary expertise, willingness and ability to provide their services without compensation clearly appears to have been inadequate to meet the growing need.

These filing dates reflect when the case was first filed, and many of these cases end up being transferred to a different city's Immigration Court when the children themselves move. Thus several months can pass before a juvenile case reaches its latest court. One would therefore expect recent months to have the lowest rates of representation, but this has not been the case. Representation rates hit their low point for cases filed six months ago in March 2014 (16%) and April 2014 (15%). These rates actually rebounded for cases filed in May (22%) and June (20%) when the peak of filings occurred, perhaps due to the mobilization of community legal resources in response to the media attention this issue was then receiving (see detail table to Figure 3).

Pending Cases by Nationality

As for the representation of unaccompanied children in the 63,721 court cases still pending as of October 31, 2014, Table 2 shows that most of these cases (67%) were filed during FY 2014. We also see that because cases without attorneys tend to move through the court system more quickly, cases that have been pending longer tend to be those where the unaccompanied juvenile had an attorney.

Table 3 provides details on representation for pending cases involving unaccompanied children by nationality. Over 9 out of 10 (92%) of these juveniles are from the Central American countries of Honduras, El Salvador, and Guatemala. While these three countries dominate, two more countries have at least 1,000 pending cases — Mexico and Ecuador. These five countries accounted for 97 percent of all pending juvenile cases.

While there are differences in representation rates by nationality, these differences appear to be at least partially explained by when their cases were filed. The more recent their arrival, the lower their

representation rates. For example, three out of four (74%) of those from Honduras and two out of three from El Salvador (65%) and Guatemala (67%) arrived just last year (FY 2014). In contrast, the number of those who arrived last year was 60 percent for Mexicans and only 49 percent for children from Ecuador.

Table 2. Pending Immigration Court Cases Involving Unaccompanied Juveniles

Fiscal Year Case Filed	Pending Cases	No Attorney	With Attorney	Percent With Attorney
Total	63,721	43,030	20,691	32%
FY 2015	229	198	31	14%
FY 2014	42,857	34,130	8,727	20%
FY 2013	13,373	7,183	6,190	46%
FY 2012	4,182	1,226	2,956	71%
before FY 2012	3,080	293	2,787	90%

Table 3. Nationality and Representation

Nationality	Pending Cases	No Attorney	With Attorney	Percent With Attorney
All	63,721	43,030	20,691	32%
Honduras	20,965	15,843	5,122	24%
El Salvador	19,352	12,400	6,952	36%
Guatemala	18,074	12,017	6,057	34%
Mexico	2,698	1,663	1,035	38%
Ecuador	1,030	425	605	59%
Other	1,602	682	920	57%

Pending Cases by Court Location

Pending cases involving unaccompanied children are not distributed evenly across the country. Half of these pending cases can be found in just six of the more than 50 Immigration Courts. New York City heads the list with one out of every eight (12.3%) or 7,865 cases. Houston has the second largest number of pending cases (5,964), following by Arlington, Virginia (5,178) in third place. Los Angeles (4,920), Baltimore (3,949) and San Francisco (3,698) make up the remaining six with the largest number of pending cases with unaccompanied juveniles.

Fifteen percent (15%) of the Immigration Court's backlog as of October 31, 2014 was composed of cases involving unaccompanied children, but this percentage varied sharply by court. For those courts with at least 10,000 cases in their overall backlog, only 3 percent of these involved unaccompanied children in Phoenix, while in Arlington the proportion was 29 percent — nearly twice the national average. For the Immigration Courts with sizable backlogs of under 10,000 cases, the highest concentration of juvenile cases could be found in Charlotte, North Carolina and Baltimore, Maryland. For each of these, unaccompanied children's cases made up fully 44 percent of their backlog. Table 4 provides comparable figures for all of the Immigration Court locations.

Table 4. Immigration Court Backlog by Location

Immigration Court	Current Backlog		
	Total	Unaccompanied Children	Percent
All Courts	421,972	63,721	15%
Charlotte	4,745	2,094	44%
Baltimore	8,953	3,949	44%
Arlington	17,675	5,178	29%
New Orleans	8,039	2,350	29%
Memphis	8,248	2,189	27%
Harlingen	8,386	1,968	23%
Kansas City	3,805	857	23%

Dallas	7,291	1,616	22%
Hartford	2,201	474	22%
Houston	29,273	5,964	20%
Boston	11,289	2,022	18%
Miami	18,348	3,247	18%
Philadelphia	5,456	952	17%
Atlanta	13,012	2,257	17%
Orlando	6,376	1,104	17%
Cleveland	5,551	898	16%
Bloomington	3,217	456	14%
New York	56,837	7,865	14%
Omaha	5,344	703	13%
Newark	19,678	2,559	13%
San Francisco	28,669	3,698	13%
Portland	2,635	328	12%
West Valley	1,679	182	11%
Chicago	17,996	1,783	10%
Las Vegas	4,032	398	10%
Los Angeles	50,545	4,920	10%
Detroit	3,934	377	10%
San Diego	3,240	307	9%
Seattle	5,009	445	9%
Denver	8,826	712	8%
York	475	37	8%
San Antonio	18,892	1,168	6%
Saipan	23	1	4%
Honolulu	136	5	4%
Phoenix	11,334	377	3%
Buffalo	3,344	110	3%
Imperial	1,564	29	2%
Tucson	1,650	26	2%
Napanoch	264	3	1%
El Paso	7,160	73	1%
New York — DET	506	5	1%
Guaynabo	243	2	1%
Houston — Detained	1,541	11	1%
Florence	421	3	1%
Eloy	990	7	1%
Adelanto	675	4	1%
Oakdale	364	2	1%
Los Fresnos	384	2	1%
Lumpkin	400	2	1%
Miami — Krome	513	1	0%
Tacoma	730	1	0%
Elizabeth	277	0	0%
Hagatna	17	0	0%

Courts also varied in terms of the proportion of their pending cases in which unaccompanied children were represented by attorneys. While the national average, as noted above, was that one-third (32%) of pending cases were represented, among the six courts with the largest number of these cases,

representation rates varied from a low of 19 percent in the Arlington, Virginia court to a high of 43 percent in New York City.

Table 5 provides representation rates for all courts with at least 25 pending cases involving unaccompanied juveniles. Courts in Texas captured both the top and bottom spots. For the El Paso Immigration Court, over three out of four of its 73 pending cases had attorneys, while only 6 percent of the 1,968 children's cases pending before the Harlingen Immigration Court were represented.

Table 5. Pending Cases Involving Unaccompanied Juveniles, by Immigration Court*

Immigration Court	Unaccompanied Children	With Attorney	
		Number	Percent
All Courts	63,721	20,691	32%
El Paso	73	56	77%
Omaha	703	499	71%
York	37	26	70%
Hartford	474	263	55%
Cleveland	898	498	55%
Tucson	26	14	54%
Boston	2,022	1,056	52%
Imperial	29	14	48%
Philadelphia	952	447	47%
Bloomington	456	209	46%
Denver	712	313	44%
New York	7,865	3,392	43%
Orlando	1,104	475	43%
Las Vegas	398	168	42%
Detroit	377	157	42%
Los Angeles	4,920	1,958	40%
Kansas City	857	337	39%
Newark	2,559	999	39%
San Francisco	3,698	1,423	38%
Portland	328	122	37%
San Diego	307	114	37%
Seattle	445	164	37%
Buffalo	110	40	36%
Miami	3,247	1,117	34%
San Antonio	1,168	391	33%
West Valley	182	53	29%
Phoenix	377	109	29%
Memphis	2,189	626	29%
Baltimore	3,949	1,084	27%
Houston	5,964	1,532	26%
Atlanta	2,257	506	22%
Charlotte	2,094	469	22%
Chicago	1,783	378	21%
Arlington	5,178	968	19%
New Orleans	2,350	394	17%
Dallas	1,616	185	11%
Harlingen	1,968	113	6%

** Courts with at least 25 pending cases involving unaccompanied juveniles.*

411 F.3d 135
United States Court of Appeals,
Third Circuit.

Lorraine FIADJOE Petitioner,
v.
ATTORNEY GENERAL OF THE UNITED STATES, Respondent.

Filed: June 17, 2005.

Before: ROTH, SMITH, Circuit Judges and DEBEVOISE*, Senior District Court Judge.

Petitioner, Lorraine Fiadjoe, petitions for review of orders of the Board of Immigration *137 Appeals ("BIA") denying her application for asylum, withholding of removal and relief under the Convention Against Torture and denying her motion for reconsideration. With the exception of an eleven year interval, from 1978, when Ms. Fiadjoe was seven years of age, until her flight from her native Ghana to the United States in March 2000, Ms. Fiadjoe was held as a slave of her father, a priest of the Trokosi sect, who, in accordance with the tenets of the sect, forced his daughter to work for him and abused her physically and sexually. Ms. Fiadjoe sought asylum and other relief on the ground that if she were returned to Ghana she, as one of the women subject to the practices of the Trokosi sect, would likely once again become subject to her father's bondage and abuse, a consequence that Ghanian government authorities were unable or unwilling to prevent.

Both the Immigration Judge ("IJ") and the BIA found that Ms. Fiadjoe's testimony was not credible, and the BIA found that Ms. Fiadjoe failed to establish that the government of Ghana was either unwilling or unable to control her father's sexual abuse. We conclude that these findings are not supported by reasonable, substantial and probative evidence on the record considered as a whole. We will grant the petition and remand the case for a new hearing and development of the record before a different IJ.

I. *Procedural Background*

On March 11, 2000, using a passport bearing the name of another person, petitioner, Lorraine Fiadjoe, entered the United States. She is a member of the Ewe tribe and a native and citizen of Ghana. She was detained as an arriving alien and interviewed. Upon her refusal to be sent back to Ghana, the immigration authorities transferred her to the York County [Pennsylvania] Prison.

On March 30 Asylum Officer James L. Reaves conducted an Asylum Pre-Screening Interview of Ms. Fiadjoe, after which he found that she had established a significant possibility of a claim for asylum based on her membership in a particular social group (unmarried women over 25 in Ghana). He also found that Ms. Fiadjoe had established a credible fear of persecution or torture.

....

Ms. Fiadjoe filed applications for asylum, withholding of removal, and protection under the Convention Against Torture, Article 3 of the Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment,

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G.A. Res. 39/46, Annex 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) ("CAT"). The IJ, Donald Vincent Ferlise, held an evidentiary hearing on April 30, 2002, after which he denied Ms. Fiadjoe's application for relief and ordered her removed to Ghana.

Ms. Fiadjoe filed a timely appeal with the BIA. On June 6, 2003 the BIA dismissed the appeal. Ms. Fiadjoe filed a ***138** timely petition for review of the BIA's decision in this court and subsequently filed a motion with the BIA seeking reconsideration of the BIA's June 6 order. On February 18, 2004 the BIA denied the motion to reconsider. Ms. Fiadjoe filed a petition for review of the BIA's February 18 decision. That petition has been consolidated with the first petition.

II. *Petitioner's Evidence*

Ms. Fiadjoe's claims for relief stem from her assertion that from age seven until she fled from Ghana, with an eleven year interval from 1978 until 1989, her father held her as a slave, subject to physical beatings and frequent rape, pursuant to the tenets of the Trokosi religion, of which her father was a priest.

The nature and existence of the Trokosi practices are described in a number of documents that are in the record. The United States Department of State Country Report on Human Rights Practices in Ghana released in February 2001 (the "State Department Report" or the "Report") is one example. In a summary statement the Report states, "Violence against women is a serious problem. Traditional practices, including a localized form of ritual servitude (Trokosi) practiced in some rural areas, still result in considerable abuse and discrimination against women and children." The Report further noted that "[v]iolence against women, including rape and domestic violence, remains a significant problem. A 1998 study revealed that particularly in low-income, high-density sections of greater Accra, at least 54 percent of women have been assaulted in recent years," and that "[w]omen, especially in rural areas, remain subject to burdensome labor conditions and traditional male dominance."

The State Department Report described in some detail Trokosi practices:

> Although the Constitution prohibits slavery, it exists on a limited scale. Trokosi, a traditional practice found among the Ewe ethnic group and in part of the Volta Region, is an especially severe human rights abuse and an extremely serious violation of children's and women's rights. It is a system in which a young girl, sometimes under the age of 10, is made a slave to a fetish shrine for offenses allegedly committed by a member of the girl's family. In rare instances, boys are offered. The belief is that, if someone in that family has committed a crime, such as stealing, members of the family may begin to die in large numbers unless a young girl is given to the local fetish shrine to atone for the offense. The girl becomes the property of the fetish priest, must work on the priest's farm, and perform other labors for him. Because they are the sexual property of the priests, most Trokosi slaves have children by the priests. Although the girls' families must provide for their needs such as food, most are unable to do so. There are at least 2,200 girls and women bound to various shrines in the Trokosi system, a figure that does not include the slaves' children. Even when freed by her fetish priest from the more onerous aspects of her bondage, whether voluntarily or as a result of intervention by activists, a Trokosi women generally has few marketable skills and little hope of marriage and typically remains bound to the shrine for life by psychological and social pressure arising from a traditional belief that misfortune may befall a Trokosi woman's family or village if she abandons her obligations to the shrine. When a fetish slave dies, her family is expected to replace her with another young girl, thus perpetuating the bondage to the fetish shrine from generation to generation.

***139** In 1998 Ghana's Parliament passed legislation that, among other provisions designed to protect women, banned the practice of "customary servitude" (known as Trokosi). After passage of this legislation, the Report states, "[t]he CHRAJ and International Needs have had some success in approaching village authorities and fetish priests at over 316 of the major and

minor shrines, winning the release of 2,800 Trokosi slaves to date and retraining them for new professions." However, as of the time of the report (2000), "[t]here are at least 2,200 girls and women bound to various shrines in the Trokosi system, a figure that does not include the slaves' children."

Despite the 1998 legislation, as of the year 2000, "[t]he Government has not prosecuted any practitioners of Trokosi, and in August 1999, a presidential aide criticized anti-Trokosi activists for being insensitive to indigenous cultural and 'religious' practices." The Statement Department Report recites at great length the terrible abuses committed by Ghana's police, noting that "[i]n recent years, the police service in particular has come under severe criticism following incidents of police brutality, corruption, and negligence." With respect to the police and their reaction to violence against women, the Report recites "[v]iolence against women, including rape and domestic violence, remains a significant problem ... a total of 95 percent of the victims of domestic violence are women, according to data gathered by the FIDA. These abuses generally go unreported and seldom come before the courts. The police tend not to intervene in domestic disputes."

It is against this well-documented background that Ms. Fiadjoe's account of her own experiences unfolds. These events are described in her affidavit in support of her asylum application (Form I-589) and in her April 30, 2002 hearing testimony. They are described in the report of the psychologist who treated her for the trauma these events caused.

Ms. Fiadjoe was born a member of the Ewe tribe on March 17, 1971 in Accra, Ghana. When she was a young child her parents separated. She was too young at that time to remember her parents living together. Her mother remarried and remained in Accra. Her father, a farmer, also remarried and lived in a village called Veku outside of Anloga, a remote area of rural Ghana. Ms. Fiadjoe was sent to live with her father.

The father was a Trokosi priest, maintaining a shrine in his home where he and other members of the Trokosi cult conducted Trokosi rituals. In 1978 when Ms. Fiadjoe was seven years of age, her father, pursuant to Trokosi practices, sought to make her his slave, working for him and the shrine and submitting to him sexually. During an approximately three months period the father sexually abused Ms. Fiadjoe as part of the Trokosi tenets. Fortunately for Ms. Fiadjoe, her father's sister, Aunt Dela, objected to this abuse and took Ms. Fiadjoe to live with her family in Accra. There Ms. Fiadjoe no longer saw her father and was able to attend school and live the life of an independent young woman. She was a Christian, of the Baptist persuasion.

Sadly, in 1989 Aunt Dela was killed in an automobile accident. Her husband remarried and directed Ms. Fiadjoe to leave his house. She had nowhere else to go except to return to her father in Veku. There she once again became her father's slave subject to beatings and rape. Approximately a year after her return she described to her grandmother the torments to which she was being subjected. The grandmother reported the beatings to the police but did not mention the rapes because of the disgrace that such a revelation would bring *140 upon the family. The police refused to intervene on the ground that only a domestic dispute was involved.

Ms. Fiadjoe attempted to escape from these conditions. She went to work selling fish in order to accumulate some money. When she had saved enough she moved out of her father's house and rented a room of her own. However, after returning to her room one evening her landlord returned her rent and told her she could not stay. He had been threatened by her father. Ms. Fiadjoe sought to escape through marriage and dated two men of her village, first Titi and then Agol, each of whom wanted to marry her. Her father would not allow a marriage and scared off each of these men.

In 1996 Ms. Fiadjoe met a Muslim man, Ahmed Kublano who lived with his parents in Anloga. His brother Rasheed lived nearby. Ms. Fiadjoe and Ahmed fell in love and wanted to marry. In order to persuade the father to consent Ahmed brought him gifts, but he could not bring his family because they were Muslims and opposed the marriage. Ms. Fiadjoe had informed Ahmed about the beatings but had not told him that her father periodically raped her. Ahmed persuaded her to leave her home and go with him to stay with his cousin in Nigeria.

The two fled to Nigeria and stayed with the cousin. They stayed there a week, but the cousin started to approach Ms. Fiadjoe sexually and they had to leave. Having no money it was necessary that they return to Ghana. Ms. Fiadjoe had no place to go

other than her father's house. As she explained at her asylum hearing, she had to go back "because we [she and Ahmed] are not married and in Ghana before you can be free from your father, your father have to accept your marriage."

The father resumed beating Ms. Fiadjoe and poured boiling water over her because she had disobeyed him. The sexual abuse continued. She and Ahmed continued to see each other and still wanted to marry. It was a star-crossed relationship. As Ms. Fiadjoe stated in her affidavit: "My father hated Ahmed because he did not want me to be with anyone but him, and because Ahmed was a Muslim. My father was opposed to the marriage and he said that I can't marry Ahmed because I am a Christian. Ahmed's family did not approve of me and did not want us to marry because I am a Christian."

Ms. Fiadjoe became pregnant by Ahmed and hoped that this would persuade her father to agree to her marriage. When she told her father of her pregnancy he beat her until she miscarried. Ahmed continued to visit Ms. Fiadjoe. He did so on March 5, 2000, waiting in her bedroom before they went out together. Ms. Fiadjoe testified that at that point "I went to the shower to take a bath and then, when I came back, when I was coming out, I saw my father coming out of my room, but I knew Ahmed was in the room, so when I went there Ahmed was lying in blood ... I hold [his] hand and he didn't talk to me, he was just lying in the blood and he didn't do anything, so to me I was thinking he's dead."

Ms. Fiadjoe started shouting and her father told her that if she didn't shut up he would kill her. She took the money she had saved and left the house. She proceeded to Ahmed's brother, Rasheed, to tell him what had happened. She then went to the roadside and took a car to Accra. There she went to her mother's house and told her what had happened. The mother did not want Ms. Fiadjoe to stay with her because she knew the father was dangerous. Ms. Fiadjoe then sought refuge with her Aunt Dela's husband, who did not even want her to sit down, or enter *141 the house because he was afraid of the father.

Next Ms. Fiadjoe went to a person she had known for many years named Alfred who, for fear that the father would suspect that Ms. Fiadjoe was with him, took her to his girlfriend's house. As Ms. Fiadjoe testified: "When he took me to his girlfriend's house, he told me you can't stay here with this problem, you can't stay here, so, he took me to town, took passport size picture and then he gave me some clothes, I stayed there for about five days, I stayed with them for about five days, he gave me passport to just leave ... The passport he gave to me, I'm going to Canada, if I go to Canada, I will meet somebody at the airport, they will be holding my name."

Ms. Fiadjoe gave five hundred thousand Ghanian cedis to Alfred and received from him $130 U.S. dollars and the passport which bore her photograph and the name Mercy Appiah-Kubi. Alfred drove her to the airport on March 10, 2000. She flew to JFK Airport in New York City, arriving on March 11. There she was taken into custody by INS officials.

INS officials questioned Ms. Fiadjoe that day and completed a handwritten Record of Sworn Statement in Proceeding under Section 235(b)(1) of the Act. Her answers made very little sense. In response to the question "Why did you leave your home country or country of last residence?", she responded, "I want to look after my mother." In response to the question "Do you have any fear or concern about being returned to your home country or being removed from the United States?" she replied, "Yes. I cannot look after my sisters and brothers." In response to the question "Would you be harmed if you are returned to your home country or country of last residence?", she responded "Yes ... I can't stand the responsibilities."

After the INS transferred Ms. Fiadjoe to York County Prison, Officer Reaves administered an Asylum Pre-Screening Interview on March 30. Contrary to the facts as she later recounted them, Ms. Fiadjoe informed Officer Reaves that her father's beatings began three years ago, that her father tried to have sex with her but that she never allowed it.

In due course Ms. Fiadjoe was released from detention and took up residence at International Friendship House. She had great difficulty adjusting to her environment and neighborhood. Her then attorney referred her to Kathleen M. Jansen, M.S., C.T.S., a psychologist and adult therapist associated with the Victim Assistance Center of York, Pennsylvania, who first saw Ms. Fiadjoe on May 5, 2000. At the outset Ms. Jansen found that Ms. Fiadjoe was withdrawn and highly anxious, made almost no eye contact, kept her head down, spoke very softly and frequently dissociated[2].

Ms. Jansen's recital of the events of Ms. Fiadjoe's prior life coincided virtually identically with events as later described in

Ms. Fiadjoe's asylum affidavit, which she executed on July 5, 2001, and her April 2, 2002 testimony. In three respects Ms. Jansen's report became a basis of the IJ's and the BIA's credibility determinations. First, it is apparent that she had no understanding of the Trokosi sect and its relationship to the torments to which Ms. Fiadjoe ***142** was subjected. In this regard Ms. Jansen wrote, "Ms. Fiadjoe describes her father as having a religious 'fetish' which I have come to believe refers to what we would call an addiction." Second, referring to Ahmed, Ms. Jansen wrote, "[h]e was aware of the sexual assaults by her father, but was powerless to stop them." Third, she described the death of Ahmed as if he had been shot, writing: "On the night before she left her father's home for the last time, she reports being in the 'shower room' when she heard noises. When she emerged, she found her boyfriend lying *shot* on the floor. He was still alive when she reached him, and died in her arms." (emphasis added).

Ms. Jansen described Ms. Fiadjoe's emotional status:

> Work with Ms. Fiadjoe has been complicated by the long history of multiple traumas and the underlying fear of being returned home. As with many incest survivors, she has learned to endure trauma by dissociating, emotionally removing herself from her surroundings until the pain has subsided.

. . . . .

> Each time I met with Ms. Fiadjoe, I see dramatic improvements. She has established eating and sleeping habits that are within normal limits. Her communication abilities have improved, although she continues to occasionally dissociate when discussing emotionally painful events. She is able to maintain reasonable eye contact and has a significantly greater range of affect. She is able to discuss many more difficult subjects without dissociating or breaking down. She remains extremely fearful of her father finding out where she is and of being sent back to Ghana and forced to return to his home.

Ms. Jansen's report thus described Ms. Fiadjoe's somewhat fragile emotional state as she proceeded towards her asylum hearing continuing "to occasionally dissociate when discussing emotionally painful events."

III. *April 30, 2002 Hearing and Initial Oral Decision*

Ms. Fiadjoe's asylum hearing on April 30, 2002 posed a challenge to her ability to discuss the difficult subjects of rape and incest without dissociating or breaking down. Her attorney, Mr. Piver, commenced by questioning her about her early years, her religion, Trokosi practices and the start of her father's sexual abuse when she was seven.

While Ms. Fiadjoe testified about the initial sexual abuse at age seven, the cessation of the abuse while she was in Accra with her Aunt Dela and its resumption eleven years later, the IJ, Donald V. Ferlise, appeared unable to comprehend this sequence of events and the following interchange between him and the witness took place:

> Q: Well, how long, how long did this go on, that you were being raped and beaten?

JUDGE TO MR. PYVER (sic)

> Q: What?
>
> A: We're getting to that?
>
> Q: Well, I'm getting to it now.

JUDGE TO MS. FIADJOE

Q: How did this go on?

A: It, when I left to Accra it stopped, but when I came back to my father again then, at the age of 18 it continued from there.

Q: All right, (indiscernible) at age seven, did your father beat or rape you at age seven?

A: Yes.

*143 Q: For how long of period of time did that go on?

A: For, til I was seven, I know my father was raping me.

Q: Ma'am, you're not making any--

A: For it went--

Q: Ma'am, you, you can cry, that's fine, but your not making any sense, and the tears do not do away with the fact that your not making any sense to me. Now, rather than crying, just answer the question. You said, your father raped you at age seven and he would beat you, correct?

A: Yes, but I didn't tell anybody.

Q: I don't care if you did or not. At age seven, how long did this go on that he was raping you and beating you?

A: In fact, he was doing that to me when I cried to my auntie, I want to--

Q: Ma'am, I don't like it when someone beats around the bush, okay, when they don't answer me. Another thing I don't like is when somebody makes sounds as if their crying and their eyes stay dry, all right. It's a form of histrionics, stage (indiscernible), I don't like that. I want straight answers and I want straight answers right now. You said, your father beat you and raped you at age seven, how long did that go on while you were age seven?

A: In fact, it went until age seven and I left.

Although it had been established that Ms. Fiadjoe had been born in 1971, that her father's sexual molestation began when she was seven in 1978, that she left for Aunt Dela's home that year and returned to her father eleven years later when Aunt Dela died, the IJ hounded Ms. Fiadjoe because after the IJ's previous brow beating she could not testify as to the year when she returned to her father. This exchange ensued:

MR. PYVER (sic) TO MS FIADJOE

Q: Okay, did you, when you went back to live with your father, had you, did, strike that--, when you went back to live with your father, how was your treatment at that time?

A. He tried to beat me and rape me again.

Q: Okay, how long did that start after you returned to his home?

A: After a year.

Q: After a year.

JUDGE TO MS. FIADJOE

Q: All right, when did you return to your father, what year?

A: (No audible response).

Q: Madam, please answer my question?

A: I don't remember the year, but I knew I was 18 years, I don't remember the year.

Q: You don't know what year it occurred in?

MR. PYVER (sic) TO MS. FIADJOE

Q: No, how, what year were you in--

A: Wait a minute, please

JUDGE TO MS. FIADJOE

Q: Do you know what year it, it occurred in?

A: (Indiscernible).

Q: You know the question, please don't do this, don't beat around the bush, it's aggravating, you know the question, what year did you return to your father?

A: (No audible response).

*144 JUDGE FOR THE RECORD
All right, I find the respondent is non responsive to the question.

The IJ challenged Ms. Fiadjoe's testimony that her father maintained a room in his house which contained idols:

JUDGE TO MS. FIADJOE

Q: Did you ever go into the room?

A: No.

Q: How do you know what was inside the room if you were never in there?

A: Because I go there once a month.

Q: Well, how do you know--

A: - To perform, in there performing, I see them performing rituals.

Q: Were you in the room or not?

A: No.

Q: Well then how did you know what was in the room if you were never in there?

A: There's (indiscernible), I don't know, I know there is idols.

Q: How do you know that if you never went in?

A: Because they have some of them outside, outside, they have some of them outside.

Q: How can you tell me what's in the room if you were never there, explain that to me?

A: I'm not allowed there because, I'm not part of them and I see some of the idols inside and outside the room, so that it is why I'm saying their idols. And they (indiscernible) in there particular days and they (indiscernible), they go there to perform rituals.

Q: So, it's because there's idols outside the room, you think there's idols inside the room, although you've never seen them?

A: Yes, because they prepare food and a lot of them outside, they take into the room.

The IJ pursued with extreme insensitivity a subject that must have been particularly painful to Ms. Fiadjoe-the murder of Ahmed:

JUDGE TO MS. FIADJOE:

Q: You told me, that you never told Ahmed, that your father had sexually assaulted you, but apparently, you told Ms. Jansen, that you told Ahmed about the sexual assaults, why is that?

A: In fact, I told, Ms. Jansen, that I let Ahmed know that abuse, but I didn't clarify it today.

Q: Well, she's stating here, that Ahmed was aware of the sexual assaults by your father, that's pretty clear to me.

A: But, I did not tell her about the assault, the beatings and all, I didn't clarify it to, Ms. Jansen.

Q: Well, is she, she a fortune teller, she can read your mind without you telling her, it's clear here, she says that Ahmed was aware of the sexual assaults by your father, so, you must have told her. That's not what you told me today though, why is that, why is there a difference between what, Ms. Jansen, writes in her letter and what you've told me?

A: Because, Ms. Jansen, is the one who let me know it's okay to tell, but I did not explain that, I did not tell this part and this part, I just say, abuse and say (indiscernible), I did explain, clarify that to her, but she let me know that it's okay to tell somebody so that you can, I can feel okay, I can be healed (indiscernible).

*145 Q: Yes, but your double talking me, it says that, just answer my question, the letter from Ms. Jansen says, that Ahmed knew about the sexual assaults by your father, you told me that Ahmed did not know, so tell me why Ms. Jansen's telling me one thing, and why you're telling me something else?

A: (No audible response).

Q: I'm waiting for your answer.

A: Please, I don't know, I don't have answer for that.

The concluding portions of the hearing further demonstrated the IJ's continuing hostility towards the obviously distraught Ms. Fiadjoe and his abusive treatment of her throughout the hearing. He had succeeded in returning her to the condition which Ms. Jansen had enabled her to overcome after repeated therapy sessions, breaking down and dissociating. As reflected in the transcript:

JUDGE FOR THE RECORD
All right, let me go off the record and we'l (sic) decision.

(OFF THE RECORD)

(ON THE RECORD)

JUDGE RENDERS ORAL DECISION

JUDGE TO MS. FIADJOE

Q: Ms. Fiadjoe, you've heard my decision, you've heard what I've just said?

A: (No audible response).

Q: Oh, you were sleeping there, you fell asleep didn't you?

A: (No audible response).

Q: You fell asleep during my decision?

A: No, I'm feeling headache.

Q: Did you hear what I said or were you asleep?

A: I wasn't asleep.

Q: Did you hear what I said?

A: I thought that you (indiscernible), so I didn't.

Q: Okay, all right, well, what I said was, that first of all, I don't believe your testimony, I think that you were making up your testimony as you were going along. Your testimony is contradicted by, much of it is contradicted by your own witness, Ms. Jansen, her, her the letter that she wrote, your testimony generally doesn't make any sense. I further found, and I denied it, basically because of that, I further found that if I had found that you were credible, that you were telling me the truth, I do not find that--

(OFF THE RECORD)

(ON THE RECORD)

JUDGE TO MS. FIADJOE

Q: I don't find that you have been persecuted and on one of the five statutory grounds. I don't find, first of all, there are relatively few women involved in this movement, all right, sexual slaves. They number by 2,200, now you described it as, as a sexual slave, I read from the State Department it seems there's, there's some sexual slavery involved with it, but it has a lot to do with idiolatry and voodoo and fears and just a lot of nonsense. I don't find that a group of 2,200 plus or minus women would be particular social group, it's small group and it's only in a certain section of, of Ghana, around the (indiscernible) region. Even if I found that it was a particular social group, the government is not persecuting anyone, all right, and the government is not allowing ***146** this to continue, they passed a law in 1998 and they had, there trying to abolish Trokosi and apparently according to the State Department, they think that it will be abolished in the, in the near future. So, even if it were a particular social group, that's these women, a small group of women, I don't find that they've been persecuted pursuant to definition of persecution. And for that reason, I've denied your application, do you understand, now?

A: Yes.

Q: Okay, the answer is yes.

IV. *The Sanitized Oral Decision*

On the hearing date the IJ also delivered a sanitized version of his original crude (and cruel) Oral Decision. It will be referred to as the "IJ Decision".

Having found that Ms. Fiadjoe was "inadmissible for presenting a bogus passport to the Immigration authorities" and also under Section 212(a)(6)(C)(i) (fraud on an immigration official), the IJ set forth general legal principles applicable to applications for asylum and for restriction on removal.

Turning to the circumstances about which Ms. Fiadjoe testified, the IJ rejected the evidence that Trokosi was a form of religion, finding that "it does not appear to the Court that this is a religion, it is rather a cult."

The bulk of the opinion was devoted to the reasons why the IJ found Ms. Fiadjoe totally incredible. As he stated in his original oral decision "I don't believe your testimony. I think that you were making up your testimony as you went along." The first reason for this finding was Ms. Fiadjoe's inability to specify the year in which she returned to her father after spending eleven years with Aunt Dela. The IJ wrote:

> The respondent was asked when she returned to her father and she was unable to tell the Court when it occurred. If indeed this had transpired in the respondent's life and if indeed she was living safely with her aunt for 11 years, it is abundantly clear to the court that the respondent would be able to tell me when she returned home to that situation that she feared so much.

The second reason that the IJ gave for rejecting Ms. Fiadjoe's testimony was the inconsistency he perceived between her testimony that she had never been in the room in which her father and other participants performed rituals and her testimony that there were idols in that room:

> The respondent's father told her that he wanted her to be a Trokosi slave, she stated that the father had a room inside his house in which she was not permitted to enter, in which there were idols. The Court asked the respondent if she had never entered that room, how she knew there was idols inside; and her answer was that she presumed they were idols inside the room that she had never entered since they were idols outside the room. This line of thought on the respondent's part is not particularly persuasive.

The IJ found reason to doubt Ms. Fiadjoe's testimony in the fact that she returned to her father's house after returning with Ahmed from Nigeria:

> Ahmed and the respondent in April of 1997, traveled to Nigeria by bus to live with Ahmed's cousin. The cousin of Ahmed apparently made sexual advances to the respondent, so that after three weeks, she and Ahmed returned to Ghana and the respondent returned to her father's home. The respondent was asked why, if she had been beaten and *147 raped at her father's home, did she return there. She states that she returned there since she did not want her father to be angered by the fact that she was with Ahmed. This absolutely is totally implausible and totally nonsensical to the Court, insofar as the respondent was returning to a situation where she knew she was going to be raped and beaten. And I don't believe that she would have any fear that her father would be angered and if she did have a fear, that fear would be a lesser fear than the rape and the beatings that she knew awaited her. As it turned out, when the respondent did return, her father not only beat her but poured hot water on her as a form of punishment.

The IJ relied upon perceived inconsistencies between Ms. Fiadjoe's testimony and her statements to Ms. Jansen as reflected in Ms. Jansen's report. He found that Ms. Jansen's report cast doubt upon Ms. Fiadjoe's testimony that her abusive father was part of the Trokosi sect or that she was a Trokosi slave:

> The respondent submitted to the Court a letter/report from Social Worker Kathleen Jansen, which is found at Exhibit 6, tab 2. A careful examination of Ms. Jansen's letter reflects nothing to the effect that the respondent's father was a member of the Trokosi cult, nor that the respondent herself was a Trokosi slave. The respondent was not able to explain why what she told the Court, was not told to the social worker.

The IJ found that Ms. Fiadjoe's testimony that she only told her grandmother about her father's sexual abuse is contradicted by Ms. Jansen's report which recites that Ms. Fiadjoe also told her mother about the sexual abuse. The IJ found contradiction of Ms. Fiadjoe's testimony that she never told Ahmed about the sexual nature of her father's abuse in the statement in Ms. Jansen's letter that Ahmed "was aware of the sexual assaults by her father, but was powerless to stop them." Further, the IJ notes an inconsistency between Ms. Fiadjoe's statement that she does not know how her father killed Ahmed and the statement in Ms. Jansen's report that "[w]hen she emerged [from the shower], she found her boyfriend lying shot on the floor."

The IJ also based his credibility evaluation on statements that Ms. Fiadjoe made to immigration officials when she was initially processed after her detention. At the airport she did not disclose her reason for fleeing Ghana and "told the Immigration Officer a rather benign reason for coming here, the fact that she was not able to financially provide for her siblings." The IJ referred to the asylum prescreening interview document:

> That document reflects on page 4, that the respondent told the Immigration Officer that her father started beating her three years ago. That is three years ago prior to March 30th of 2000, consequently that would be March of 1997; however, the respondent told the Court that she was 7 years of age when the beatings began. Thus, again we have a diametric difference between what the respondent told this Court and what the respondent told the Immigration Officer during the asylum pre-screening interview.
>
> Even more interesting is the fact that, again according to this interview, the respondent told the Immigration Officer that her father never had sex with her. This totally undermines the entire case in chief, since her entire case in chief is based on her father using her as a sex slave. Whenever the Court sees such a diametric difference between the testimony that the respondent has given to the Court and the testimony that the *148 respondent has given another member of the Immigration Service, the credibility of the respondent and the case in chief gravely suffer.

The IJ emphasized that "[t]he credibility of the respondent is of extreme importance in assessing the respondent's claim .... The Court concludes that the respondent is making up her testimony as she is going along, she's making up these scenarios and she is fabricating her testimony to the Court.... the Court again states for the record that this was a frivolous application and that the respondent intentionally lied to this Court."

The IJ provided alternative grounds for denying Ms. Fiadjoe's applications for relief. He quoted the State Department Report describing the Trokosi cult, including the practice of its priests of maintaining sex slaves at Trokosi shrines. The IJ then held:

> The Court finds that being a Trokosi slave or a member of the cult, is being a member of a relatively small group. According to the State Department, it numbers approximately 2,200 people in a small area, in the southeast portion of Ghana. The Court will not find that a Trokosi slave constitutes a particular social group, insofar as it is rather a minuscule part of the general population of Ghana.

Had he found Trokosi slaves to be a particular social group, the IJ held that he "would not find that the respondent is being persecuted as being a member of that social group and does not qualify for asylum, insofar as I find that this practice is being stamped out by the government, according to the State Department reports; and that it can be eradicated by the government within a short period of time, with the passage of a law which occurred in 1998."

A rather confusing observation followed in support of the IJ's finding that Ms. Fiadjoe had not established a well-founded fear of persecution. The IJ appeared to believe that Ms. Fiadjoe was alleging that she was being persecuted because she was a member of the Trokosi sect, when in fact she was asserting that with the acquiescence of governmental officials, the Trokosi sect was persecuting her, forcing her into practices totally contrary to her Christian faith. The IJ observed:

> The government does not condone this slavery. It is perpetuated by a rather small number of people following an ideology, some type of voodoo religion or voodoo following, and the Court does not find that it constitutes a persecution of this group of women, even if these women should be classified as a particular social group. The Court considers the Trokosi as an isolated aberration of the small segment of the society in Ghana, but I do not find that it is a ground for asylum. I do not find that members of that group are being persecuted for one of the five statutory grounds for a grant of such relief.
>
> Consequently, for all of these reasons, the Court finds that the respondent has not established well-founded fear of persecution as defined, if she were returned to Ghana. Accordingly her application for asylum will be denied.

Based on the foregoing, the IJ determined i) it was unnecessary to consider whether Ms. Fiadjoe merited relief as a matter of discretion; ii) because Ms. Fiadjoe failed to establish eligibility for asylum, she failed to meet the higher standard of proof necessary for restriction on removal to Ghana; and iii) Ms. Fiadjoe does not qualify for relief under the CAT because she did not establish that she is more likely than not to be tortured if she returns to Ghana.

***149** The IJ entered orders denying Ms. Fiadjoe's request for asylum, for restriction on removal to Ghana and for withholding removal under the CAT. He ordered that she be removed from the United States to Ghana.

V. *Proceeding before the BIA*

On appeal from the IJ's decision the BIA relied heavily upon the IJ's credibility determination: "In denying the respondent's applications for relief, the Immigration Judge found that the respondent was not credible (IJ at 11-12). We agree."

....

Further, the BIA held that Ms. Fiadjoe's claims must be denied for failure to establish that the government of Ghana was either unwilling or unable to control her father's ritual abuse.

....

Because the BIA had found that Ms. Fiadjoe had not testified credibly and that she had failed to demonstrate that the government of Ghana would be unwilling or unable to protect her, it did not reach the issue of whether bondage as a Trokosi slave would meet the definition of persecution on account of membership in a particular social group or the issue whether Ms. Fiadjoe, even if credible, had established that she was, in fact, a Trokosi slave.

....

VI. *Discussion*

A. *Jurisdiction and Standard of Review:* We have jurisdiction to review final orders of the BIA under § 242(a)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1252(a)(1) (1999).

Both the IJ and the BIA made an adverse credibility determination. The final order that we review is the decision of the BIA, and normally we review the decision of the BIA, not the IJ, *Gao v. Ashcroft,* 299 F.3d 266, 271 (3d Cir.2002); *Abdulai v. Ashcroft,* 239 F.3d 542 545 (3d Cir.2001). There are exceptions to this rule. If, for instance, the BIA affirms the IJ's decision for the reasons set forth in that decision, the IJ's opinion effectively becomes the BIA's, and, accordingly, a court must review the IJ's decision. *Korytnyuk v. Ashcroft,* 396 F.3d 272, 286 (3d Cir.2005).

[1] In the present case the BIA stated at the outset that it agreed with the IJ's finding that Ms. Fiadjoe was not credible. It then set forth a single paragraph devoted to the credibility issue, listing two of *153 the inconsistencies upon which the IJ had relied. Thus, as in *Xie v. Ashcroft,* 359 F.3d 239 (3d Cir.2004), we address the circumstance in which "the BIA both adopted the IJ's adverse credibility determination and discussed some, but not all, of the underlying bases for the IJ's adverse credibility determination." *Id.,* at 242. In the present case, in light of its expression of agreement with the IJ's credibility finding and its own sketchy credibility analysis, the BIA must have relied upon the adverse credibility finding of the IJ. We thus have jurisdiction to review both the BIA's and IJ's opinions. *Id.,* at 242; see also, *Miah v. Ashcroft,* 346 F.3d 434 (3d Cir.2003); *Senathirajah v. INS,* 157 F.3d 210 (3d Cir.1998). There is an additional reason to review the INS decision and the hearing from which the decision derived. Any adverse credibility determinations based on the testimony must be viewed with great caution in view of the abusive nature of the hearing.

[2] [3] Adverse credibility determinations are reviewed under the substantial evidence standard. Under this standard, the BIA's adverse credibility determination must be upheld on review unless any reasonable adjudicator would be compelled to conclude to the contrary. Minor inconsistencies do not provide an adequate basis for an adverse credibility finding. *Xie,* 359 F.3d at 243.

[4] [5] Apart from its adverse credibility determination, the BIA found that Ms. Fiadjoe failed to establish that the government of Ghana was either unable or unwilling to control her father's ritual sexual abuse[3]. We must uphold this factual finding if it is "supported by reasonable, substantial, and probative evidence on the record considered as a whole." *INS v. Elias-Zacarias,* 502 U.S. 478, 481, 112 S.Ct. 812, 117 L.Ed.2d 38 (1992). We should find substantial evidence lacking only where the evidence "was so compelling that no reasonable fact finder could fail to find the requisite fear of persecution." *Id.* at 483-84, 112 S.Ct. 812; see also 8 U.S.C. § 1252(b)(4)(B); *Abdille v. Ashcroft,* 242 F.3d 477, 483-84 (3d Cir.2001).

B. *The IJ Hearing and Credibility Finding*[4]: Prior to the commencement of testimony before the IJ on April 30, 2002 the IJ identified the record in his possession. It included Ms. Fiadjoe's July 5, 2001 asylum affidavit (Form I-589) which recited in full detail the circumstances that led to her flight-the commencement of her father's sexual abuse at age seven, the resumption of her life as a Trokosi slave at age eighteen and the continuing beatings and periodic rape committed by her father. It recited her attempts to escape from her father's house, her flight to Nigeria, her return, her father's murder of the man whom she loved and hoped to marry, and her second flight and inability to find someone in Accra who would take her in.

Also in the record which the IJ possessed was Ms. Jansen's June 22, 2000 letter describing her therapy sessions with Ms.

Fiadjoe and Ms. Fiadjoe's emotional state. Ms. Jansen recounted how Ms. Fiadjoe's emotional condition improved markedly after sessions of counseling and that although "[h]er communication abilities have improved," she nevertheless ***154** "continues to occasionally dissociate when discussing emotionally painful events." It was, of course, necessary to testify about emotionally painful events at the April 30, 2002 hearing.

....

[6] From the outset of the April 30, 2002 hearing the IJ took over much of the questioning of Ms. Fiadjoe, both on direct and on cross-examination by the government. His tone was hostile and at times became extraordinarily abusive. If not by design, in effect, he produced the very atmosphere that Ms. Jansen and the INS Guidelines anticipated would cause memory loss, blocking, dissociating and breakdown.

Examining Ms. Fiadjoe concerning the highly sensitive subject of her father's sexual abuse at age seven, the IJ's questioning reduced her to tears (see transcript excerpt at. pp. 142-43, *supra*).

At that point in the proceedings Ms. Fiadjoe began having difficulty responding to the IJ. She had been born in 1971. In response to her attorney's questions she testified that she went to live with her Aunt Dela in Accra when she was seven, i.e., in 1978, thus bringing the sexual abuse to a temporary halt. She further testified that she remained with Aunt Dela eleven years and was 18 years of age when she returned to her father's home upon the death of Aunt Dela. A rather simple calculation would have placed this in the year 1989, but under the IJ's harsh questioning Ms. Fiadjoe was unable to recall the year and was reduced to an inability to respond (see transcript excerpt at p. 143, *supra*).

***155** The bullying nature of the IJ's questioning was further evident in his interrogation of Ms. Fiadjoe about her knowledge that her father kept idols in the room in which he worshiped when she testified that she had never been in the room. Ignoring the obvious point that Ms. Fiadjoe made, that she could see into the room without entering it, the IJ continued to badger her (see transcript excerpt at pp. 143-44 *supra*).

Dealing with a subject that can only have been extremely painful to Ms. Fiadjoe, her father's murder of her fiancé Ahmed, the IJ pursued an apparent inconsistency between Ms. Fiadjoe's testimony and Ms. Jansen's report concerning whether Ms. Fiadjoe had told Ahmed about the sexual aspect of the abuse she had suffered. The IJ reduced Ms. Fiadjoe to an inability to respond to his questions (see transcript excerpt at p. 144 *supra*).

These are examples of the manner in which the IJ treated Ms. Fiadjoe throughout the hearing. An examination of the entire transcript discloses other instances of his extreme insensitivity towards the witness and his failure to take into account the abuses to which she had been subjected in Ghana. The IJ's own concluding questions and remarks demonstrate that he had reduced her to the emotional state against which Ms. Jansen and the INS Guidelines had warned:

JUDGE TO MS. FIADJOE

Q: Ms. Fiadjoe, you've heard my decision, you've heard what I've just said?

A: (No audible response).

Q: Oh, you were sleeping there, you fell asleep didn't you?

A: (No audible response).

Q: You fell asleep during my decision?

A: No, I'm feeling headache.

Q: Did you hear what I said or were you asleep?

A: I wasn't asleep.

Q: Did you hear what I said?

A: I thought that you (indiscernible), so I didn't.

Q: Okay, all right, well, what I said was, that first of all, I don't believe your testimony, I think that you were making up your testimony as you were going along. Your testimony is contradicted by, much of it is contradicted by your own witness, Ms. Jansen, her, her, the letter that she wrote, your testimony generally doesn't make sense. I further found, and I denied it, basically because of that, I further found that if I had found that you were credible, that you were telling me the truth, I do not find that--

....

The conduct of the IJ by itself would require a rejection of his credibility finding. Apart from that consideration, the formal reasons he gave for finding "that the respondent is making up her testimony as she is going along, she's making up these scenarios and she is fabricating her testimony to the Court" do not withstand examination.

First, the IJ relied upon Ms. Fiadjoe's inability to state the year when she returned from Aunt Dela to her father's house. It is true that Ms. Fiadjoe, after being subjected to the IJ's brow beating, could not recall the year of her return. However, she testified that she was born in 1971, left for Aunt Dela's home when ***156** she was seven (1978) and returned after eleven years when she was eighteen years of age. The inability to recall during the stress of the hearing that the year of return was 1989 does not affect credibility.

The IJ found that Ms. Fiadjoe's testimony that her father kept idols in the shrine room in his home was inconsistent with her testimony that she never entered the room. In spite of the badgering nature of the IJ's questioning, Ms. Fiadjoe fully explained that without entering she could see into the room, that idols were also kept outside the room, and that she observed other Trokosi adherents enter the room to bring food to the idols and later leave. There was no inconsistency in her testimony.

Referring to Ms. Fiadjoe's testimony about her return to her father's home after her and Ahmed's abortive attempt to establish a residence in Nigeria, the IJ attributes to Ms. Fiadjoe the statement that "she returned there since she did not want her father to be angered by the fact that she was with Ahmed." The IJ found that "[t]his absolutely is totally implausible and totally nonsensical to the Court, insofar as the respondent was returning to a situation where she knew she was going to be raped and beaten." The IJ's subsequent observations make no sense: "And I don't believe that she would have any fear that her father would be angered and if she did have a fear, that fear would be a lesser fear than the rape and the beatings that she knew awaited her. As it turned out, when the respondent did return, her father not only beat her but poured hot water on her as a form of punishment." In the first place the IJ does not give an accurate recital of Ms. Fiadjoe's testimony. She did not want her father to attack Ahmed but the reason she gave for returning to her father was that "I don't, my father, I don't have anybody to go to," a fact that, as will be discussed in connection with the BIA's credibility finding, is fully supported by the record.

Next, the IJ found Ms. Fiadjoe lacked credibility because "Ms. Jansen's letter reflects nothing to the effect that respondent's father was a member of the Trokosi cult, nor that the respondent herself was a Trokosi slave. The respondent was not able to explain why what she told the Court, was not told to the social worker." The IJ's premise that Ms. Fiadjoe did not tell Ms. Jansen about the Trokosi sect is totally wrong, even if reference is made only to the letter in evidence before the IJ. Repeatedly throughout the asylum proceedings Ms. Fiadjoe referred to her father's Trokosi practices as his "fetish." In her June 22, 2000 letter Ms. Jansen writes, "Ms. Fiadjoe describes her father as having a religious 'fetish'." Ms. Jansen at that time did not understand what Ms. Fiadjoe was telling her, a misunderstanding which she later overcame, as explained in her October 31, 2002 letter, which will be discussed further in connection with the BIA's credibility determination. In any event,

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the IJ was simply in error when he stated that Ms. Jansen's letter reflects nothing to the effect that Ms. Fiadjoe's father was a member of the Trokosi cult.

The IJ perceived two other inconsistencies between Ms. Fiadjoe's testimony and what appeared in Ms. Jansen's June 22, 2000 letter. He assumed Ms. Fiadjoe told Ms. Jansen what was stated in the letter. First, Ms. Fiadjoe testified that she never told Ahmed about the sexual assaults upon her, whereas the letter states Ahmed "was aware of the sexual assaults by her father, but was powerless to stop them." Second, Ms. Fiadjoe testified that, not having seen her father kill Ahmed, she did not know how he was killed, whereas the letter states "[w]hen she emerged, she found her boyfriend lying *shot* on the floor." (emphasis *157 added). As disclosed in Ms. Jansen's October 21, 2002 letter (which was not before the IJ), these inconsistencies resulted from Ms. Jansen's erroneous assumptions, not from misstatements of Ms. Fiadjoe. Even if there were such inconsistencies (which there were not), they were minor in nature. In the entire flow of events that afflicted Ms. Fiadjoe from age seven until she fled from Ghana, it was immaterial whether Ahmed knew of the sexual abuse as well as the other forms of abuse perpetrated by the father and whether the father shot or stabbed Ahmed, the only likely other means of killing him.

The IJ relied upon statements that Ms. Fiadjoe made to Immigration officers upon her arrival in the United States and upon the occasion of her Asylum Pre-screening Interview on March 30, 2000, which are inconsistent with her asylum affidavit, the information she provided Ms. Jansen and her testimony. For reasons that will be set forth in the discussion of the BIA's credibility determination, these statements do not constitute substantial evidence that would permit a finding that Ms. Fiadjoe lacked credibility.

As the IJ expressed it, "[t]he credibility of the respondent is of extreme importance in assessing respondent's claim." No adverse credibility assessment derived from a hearing conducted under the circumstances and in the manner that the IJ conducted the April 30, 2002 hearing could survive review. Further, even if the hearing were conducted in an even-handed, fair manner, the reasons that the IJ gave for his finding of lack of credibility are not supported by substantial evidence.

....

VII. *Conclusion*

The adverse credibility determinations of the IJ and of the BIA are not supported by substantial evidence, nor is the BIA's finding that Ms. Fiadjoe failed to establish that the government of Ghana was either unwilling or unable to control her father's sexual abuse supported by substantial evidence.

We will grant the petition for review and remand the case to the BIA for further remand to a different IJ for a new hearing at which there may be received in evidence the documents that accompanied Ms. Fiadjoe's motion before the BIA for reconsideration of its June 6, 2003 decision and evidence, if available, of continuing Trokosi practices and governmental attempts to eradicate them and to protect Trokosi victims.

SMITH, Circuit Judge, dissenting: [omitted]

1 The enforcement functions of the INS have since been transferred to the Department of Homeland Security, pursuant to § 441 of the Homeland Security Act of 2002, Pub.L. No. 107-296, 116 Stat. 2135 (Nov. 25, 2002).

2 In psychology "dissociation" is "a defense mechanism in which a group of mental processes are segregated from the rest of a person's mental activity in order to avoid emotional distress, as in the dissociative disorder (q.v.), or in which an idea or object is segregated from its emotional significance, in the first sense it is roughly equivalent to splitting, in the second, to isolation." Borland's Medical Dictionary, 27th Edition (1988).

3 The BIA did not reach the issues of i) whether bondage as a Trokosi slave would meet the definition of persecution on account of membership in a particular social group; ii) whether if Ms. Fiadjoe's testimony were credible she had "established that she was, in fact, a Trokosi slave;" and iii) whether Ms. Fiadjoe could escape persecution by locating elsewhere in Ghana.

4 Significantly, on this appeal the government made no attempt to defend the credibility determinations of either the IJ or the BIA.

5 The dissenting opinion concludes that we have failed to accord proper deference to the BIA's finding on the issue of government protection in Ghana. The lengthy quotation from the State Department's 2000 Country Report on Human Rights Practices in Ghana to which the dissent refers does in fact set forth efforts of the government and human rights organizations to end the Trokosi practice, but the concluding portion of the quotation recites how ineffective the government efforts have been despite limited success by NGOs:

> The Government has not prosecuted any practitioners of Trokosi and in August 1999, a presidential aide criticized anti-Trokosi activists for being insensitive to indigenous cultural and "religious" beliefs and practices. A local group, calling itself the "Troxovi Institutional Council" (Troxovi is an alternate spelling for Trokosi) declared that Trokosi, as defined by CHRAJ and other human rights groups to be a form of ritual servitude, does not exist in the country. The group claimed that the practice of "Troxovi" does exist but neither enslaves nor exploits anyone. The Council also listed 23 "genuine Troxovi shrines" in Ghana, describing them as educational institutions and as part of the "Afrikania religion." *The claims were widely refuted by chiefs, the press, and NGOs.*

AR:343-44 (emphasis added)

6 The dissent finds Fiadjoe's hearing testimony vague concerning what her grandmother told the police. When evaluating Ms. Fiadjoe's testimony it should be kept in mind that it was given during a hearing at which the IJ treated Ms. Fiadjoe with total insensitivity throughout, causing her to break down, become confused and ultimately to become reduced to silence. The BIA majority took no account of this factor.

7 These facts, along with much other evidence, totally negate the BIA's statement that "respondent implicitly admitted that she could escape her father's abuse by moving to an urban area." It is unnecessary to rule at this time that this finding also is not supported by substantial evidence because the BIA only advanced it in a hypothetical context.

8 In light of the disposition of the case it is unnecessary to consider Ms. Fiadjoe's petition seeking review of the BIA's order denying her motion to reconsider its June 6, 2003 opinion.

9 Shortly before oral argument the government filed a motion indicating that Fiadjoe had left the United States and gone to Canada, and requested that her appeal be dismissed on the basis of the fugitive disentitlement doctrine. *See Arana v. INS,* 673 F.2d 75, 77 (3d Cir.1982) (*per curiam*). Letter briefs filed after oral argument indicate that, while Fiadjoe apparently remains in Canada, she informed DHS through counsel that she has "self-deported," and in response to this information the government withdrew its motion to dismiss the appeal.

10 In assessing the BIA's findings, the majority chastises the BIA for failing to address a June 1996 London newspaper article entitled "Slave of the Fetish." This article was submitted by Fiadjoe's counsel during the proceedings below, and was part of the administrative record before the BIA. However, this article predates by several years Ghana's anti-Trokosi efforts described in the 2000 State Department report discussed above, and it consists primarily of ambiguous statements that shed little light on whether Fiadjoe had met her burden of showing that the Ghanaian authorities were unwilling or unable to protect her.

11 I share the majority's concern with what appears from the transcript to have been the unnecessarily hostile demeanor of the IJ during Ms. Fiadjoe's hearing. However, the record as a whole supports the BIA's decision to accord limited weight to Fiadjoe's account concerning the interaction between her grandmother and the Ghanaian police. Ms. Fiadjoe's affidavit, prepared in advance of the hearing with the assistance of counsel, contains little detail concerning the specific information given by her grandmother to the Ghanaian police, and the affidavit acknowledges that the police were never informed of the alleged ritual sexual abuse that is the basis of Fiadjoe's claim for asylum.

12 The majority also recounts Fiadjoe's testimony concerning her unsuccessful efforts to relocate away from her father, and asserts that "Ms. Fiadjoe's own experiences demonstrate that where a Trokosi slave is involved the police will not intervene." Maj. Op. 159-60. This statement on its face seems to me inconsistent with the majority's own acknowledgment that the Ghanaian authorities were never informed that Fiadjoe was a "Trokosi slave."